Supreme Court, U.S.
FILED
FEB 24 1994
OFFICE OF THE CLERK

No. 93-609

In The

Supreme Court of the United States

October Term, 1993

MORGAN STANLEY & CO. INCORPORATED; GOLDMAN, SACHS & CO.; ERNST & YOUNG; SALOMON BROTHERS INC.,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF SPENDTHRIFT FARM, INC. AND BATEMAN EICHLER, HILL RICHARDS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

BARBARA B. EDELMAN
BARRY FRIEDMAN*
G. CHRISTOPHER VAN BEVER
STEVEN L. SNYDER
WYATT, TARRANT & COMBS
The Lexington Financial Center
250 West Main Street
Lexington, Kentucky 40507
(606) 233-2012

Counsel for Amicus Curiae Spendthrift Farm, Inc.

**Counsel of Record*

February 1994

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

47 pp

ELIZABETH S. FEAMSTER
FOWLER, MEASLE & BELL
300 W. Vine Street
Kincaid Towers
Suite 650
Lexington, Kentucky 40507
(606) 252-6731

JAMES E. BURNS, JR.
KEVIN P. MUCK
JOHN MISSING
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, California 94105
(415) 442-0900

Counsel for Amicus Curiae
Kemper Securities, Inc.
(formerly Bateman Eichler,
Hill Richards, Inc.)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. TO THE EXTENT IT APPLIES TO JUDGMENTS THAT ARE FINAL AND FROM WHICH AN APPEAL COULD NOT BE TAKEN, SECTION 27A(b) VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS BY OVERTURNING THE FINAL DECISION OF AN ARTICLE III COURT 5

A. The Rule That Final Judicial Decisions Must Be Respected Has Firm Roots In The Understanding Of Separation Of Powers That Informed The Drafting Of The Constitution 5

B. *Hayburn's Case* Preserves An Independent Judiciary By Ensuring That Neither Congress Nor The Executive Branch Overturns Or Otherwise Revises The Final Decisions Of An Article III Court 12

C. The Rule In *Hayburn's Case* Governs This Case 17

D. Arguments Advanced To Defend Section 27A(b) In Light Of *Hayburn's Case* Are Unavailing 18

1. It Is Irrelevant That Section 27A(b) Ordered Readjudication Rather Than Prescribing A Result 19

TABLE OF CONTENTS – Continued

Page

2. It Is Irrelevant That Congress Is Free To Prescribe A Rule Governing Future Cases 20

3. It Is Irrelevant That Congress' Interference With Final Judgments Took The Form Of Ordinary Legislation..... 21

4. The Rule In *Hayburn's Case* Unquestionably Is That Decisions Of Article III Courts Must Be "Binding And Conclusive Upon The Parties," And That Such Judgments Are Not Subject To Revision By The Legislative Or Executive Branches..... 23

II. THIS COURT DOES NOT NEED TO ADDRESS THE CONSTITUTIONAL QUESTION BECAUSE CONGRESS DID NOT INTEND SECTION 27A(b) TO REACH FINAL DECISIONS 25

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 25

Axel Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 78 (2d Cir. 1993) 26

Barr v. McGraw-Hill, 1992 WL 196754 (S.D.N.Y. Aug. 3, 1992)..... 27

Berning v. A.G. Edwards & Sons, Inc., 990 F.2d 272 (7th Cir. 1993)..... 27

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948)..... 19

Califano v. Yamasaki, 442 U.S. 682 (1979)..... 25

Communications Workers of America v. Beck, 487 U.S. 735 (1988)..... 25

Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264 (1993)..... 25

Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269 (1st Cir. 1993)..... 26

Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811 (D.C. Cir. 1974) 27, 28

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 16, 21

Fleming v. Rhodes, 331 U.S. 100 (1947)..... 17

Freeland v. Williams, 131 U.S. 405 (1889)..... 17

Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989)..... 26

TABLE OF AUTHORITIES – Continued

Page

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 17

Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865) 16

Gordon v. United States, 117 U.S. 697 (1865)... 16, 19, 24

Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993)..... 27

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) 18

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)..... *passim*

I.N.S. v. Chadha, 462 U.S. 919 (1983)..... 22

In re President's Commission on Organized Crime, 783 F.2d 370 (3d Cir. 1986) 24

In re Sharon Steel Corp., 100 B.R. 767 (Bankr. W.D. Pa. 1989)..... 24

Johnston v. CIGNA Corp., No. 92-1186, 1993 WL 500842 (10th Cir. Dec. 7, 1993)..... 2, 5, 18

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991)..... 2, 18, 20, 25, 28

Linkletter v. Walker, 381 U.S. 618 (1965)..... 18, 26

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 11

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 25

Pacific Mut. Life Ins. Co. v. First Republicbank Corp., 997 F.2d 39 (5th Cir. 1993), *cert. granted sub nom., Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.*, 114 S. Ct. 680 (1994)..... 2

TABLE OF AUTHORITIES – Continued

Page

Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487 (6th Cir.), *reh'g denied*, 11 F.3d 572 (1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11, 1994) (No. 93-1121)..... 1, 2, 18, 19, 23, 26

Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231 (E.D. Ky. 1992), *aff'd*, 1 F.3d 1487 (6th Cir. 1993) 2

Rabin v. Fivzar Assocs., 801 F. Supp. 1045 (S.D.N.Y. 1992)..... 27

Town of Deerfield v. F.C.C., 992 F.2d 420 (2d Cir. 1993)..... 24

United States v. Ferreira, 54 U.S. (13 How.) 40 (1852) 17, 24

United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386 (1934) 24

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) 19

United States v. O'Grady, 89 U.S. (22 Wall.) 641 (1875) 17

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) 20

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 17, 24

Webster v. Doe, 486 U.S. 592 (1988) 28

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS:

U.S. Const., art. III 10, 11

Securities Exchange Act of 1934, Section 27A, 15 U.S.C. § 78aa-1 (Supp. IV 1992)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS:

137 Cong. Rec. S17,382-01 (1991) 28

OTHER AUTHORITIES:

Susan L. Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561 ..... 13, 24

William S. Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 Am. Pol. Sci. Rev. 32 (1928) 6, 7, 8, 11

Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 Am. Hist. Rev. 511 (1925) ..... *passim*

Max Farrand, *The Framing of the Constitution of the United States* (9th ed. 1913) 11

The Federalist No. 48 (James Madison) 7, 9, 22

The Federalist No. 78 (Alexander Hamilton) 11

The Federalist No. 81 (Alexander Hamilton) 12, 20

1 Charles G. Haines, *The American Doctrine of Judicial Supremacy* (1932) 8

Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv. L. Rev. 208 (1901-02) 9, 20

Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 Va. L. Rev. 1253 (1988) 7

Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603 (1992) 24

TABLE OF AUTHORITIES – Continued

Page

Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527 ..... 13, 15, 24

1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (2d ed. 1992) 24

Bernard Schwartz, *A History of the Supreme Court* (1993) 24

Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. Chi. L. Rev. 385 (1935) 7

Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. Rev. 747 (1992) 11

M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 5, 6, 7, 10, 11

Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1969) 6, 7, 8, 10, 21

Benjamin F. Wright, Jr., *The Origins of the Separation of Powers In America*, Economica (May 1933) 11

Charles A. Wright, *The Law of Federal Courts* (4th ed. 1983) 24

No. 93-609

In The

Supreme Court of the United States

October Term, 1993

MORGAN STANLEY & CO. INCORPORATED; GOLDMAN, SACHS & CO.; ERNST & YOUNG; SALOMON BROTHERS INC.,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF SPENDTHRIFT FARM, INC. AND BATEMAN EICHLER, HILL RICHARDS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI[1]

Amici are named defendants in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir.), *reh'g denied*, 11 F.3d 572 (1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11,

[1] Written consent to the filing of this *Amicus Curiae* brief has been obtained from all parties in this case and correspondence indicating that consent has been filed with the Court in accordance with Sup. Ct. R. 37.

1994) (No. 93-1121). When Congress enacted Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. IV 1992), the judgment in *Plaut* was final, the case having been dismissed as untimely pursuant to this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), and the time for appeal having run. Pursuant to Section 27A(b), plaintiffs petitioned the district court for reinstatement. The district court dismissed plaintiffs' petition, and the Court of Appeals for the Sixth Circuit affirmed, both courts holding that Section 27A(b) was an unconstitutional exercise of legislative authority. *See Plaut v. Spendthrift Farm, Inc.*, 789 F. Supp. 231 (E.D. Ky. 1992), *aff'd*, 1 F.3d 1487 (6th Cir. 1993). A petition for a writ of certiorari has been filed seeking review in this Court of the court of appeals' decision. That petition is pending.

The interest of *amici* is that this Court's decision in *Pacific Mutual Life Insurance Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993), *cert. granted sub nom., Morgan Stanley & Co. v. Pacific Mutual Life Insurance Co.*, 114 S. Ct. 680 (1994), will certainly affect, and will perhaps resolve, the issues in *Plaut*. There is a distinction between the cases, however. In *Pacific Mutual* the Fifth Circuit upheld Section 27A(b); in *amici*'s case, and in the one other circuit in which the application of Section 27A(b) to a final judgment has been addressed, Section 27A(b) was struck down as unconstitutional. *See Johnston v. CIGNA Corp.*, No. 92-1186, 1993 WL 500842 (10th Cir. Dec. 7, 1993).

Amici are participating in order to brief fully the constitutional history of the rule in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), as well as its application to the case at bar. Along with the Sixth and Tenth Circuits, *amici* believe

that the principle in *Hayburn's Case* – that final judicial decisions cannot be subject to revision by another branch of government – renders Section 27A(b) unconstitutional. Yet, inexplicably, the Fifth Circuit's decision on review in this Court neither discusses nor refers to *Hayburn's Case*. Although there are competent counsel representing the parties before this Court, they will need to address the many issues discussed by the Fifth Circuit. *Amici* therefore respectfully submit this brief to ensure full discussion of the one point they believe ought to be central to this Court's decision: Section 27A(b) is contrary to the rule established in *Hayburn's Case*, and thus unconstitutional.

SUMMARY OF ARGUMENT

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), established the principle of judicial finality: The final decisions of Article III courts must be binding and conclusive upon the parties, and are not subject to being overturned or modified by the legislative or executive branches. Understanding the rule in *Hayburn's Case* requires understanding its important historical antecedents. Immediately following the American Revolution, separation of powers was seen as a way of preventing executive tyranny by insulating the legislative branch. In practice, however, this separation resulted in legislative hegemony. Prior to the Philadelphia Convention the legislatures of the states committed numerous abuses, including the constant usurpation of the judicial function. Thus, the framers of the Constitution recognized that in order to limit legislative power they needed to supplement the separation of

powers with a system of checks and balances. Chief among these checks was an independent judiciary. But judicial independence was meaningless without what Corwin called the "highest attribute" of the judiciary's function: The power to render final judgments. Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 Am. Hist. Rev. 511, 516 (1925). This critical aspect of judicial independence was established in *Hayburn's Case*, and has been the law ever since.

In Section I of the Argument, *amici* explain the historical background of the rule in *Hayburn's Case*, and the evolution and adoption of the rule. Then, after explaining how Section 27A(b) violates the rule of judicial finality established in *Hayburn's Case*, they respond to arguments that the rule does not govern this case. In Section II, *amici* explain that this Court may nonetheless avoid the constitutional question by interpreting Section 27A(b) as inapplicable to judgments that were final at the time Section 27A(b) was adopted.

ARGUMENT

As applied to final judgments from which an appeal could no longer be taken, Section 27A(b) violates the rule of judicial finality set out in *Hayburn's Case*. *See* Section I, *infra*. This constitutional issue need not be reached, however: Section 27A(b) can and should be read in a way that avoids application to the very small number of cases that were final at the time of its enactment. *See* Section II, *infra*.

I. TO THE EXTENT IT APPLIES TO JUDGMENTS THAT ARE FINAL AND FROM WHICH AN APPEAL COULD NOT BE TAKEN, SECTION 27A(b) VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS BY OVERTURNING THE FINAL DECISION OF AN ARTICLE III COURT.

It is a bedrock principle of American jurisprudence that the final decisions of Article III courts may not be revised, overturned or otherwise modified by any other branch of government. This principle of judicial finality was established in *Hayburn's Case*, and has never been disturbed. As the Tenth Circuit observed in *Johnston v. CIGNA Corp.*, No. 92-1186, 1993 WL 500842 (10th Cir. Dec. 7, 1993), outside of the case presently before this Court, "we cannot locate a single case where a court has upheld an attempt by Congress to upset a final, nonappealable judgment in a case between private parties." *Id.* at *9 (footnote omitted).

A. The Rule That Final Judicial Decisions Must Be Respected Has Firm Roots In The Understanding Of Separation Of Powers That Informed The Drafting Of The Constitution.

The rule in *Hayburn's Case* resulted from the evolution of the doctrine of separation of powers from the time of the American Revolution to the ratification of the United States Constitution. During that period, the former colonists' views on separation of powers changed dramatically leading to the incorporation in the Constitution of the system of checks and balances. M.J.C. Vile, *Constitutionalism and the Separation of Powers* 153 (1967). One of the checks ultimately deemed most vital by the

Americans who ratified the Constitution was the existence of an independent judiciary. Vile, *supra*, at 157-58; William S. Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 Am. Pol. Sci. Rev. 32, 43 (1928). And integral to judicial independence was the rule that the final decisions of the judiciary could not be disturbed by another branch of government. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

Although separation of powers was much discussed by the revolutionaries, "the meaning it came to acquire for Americans was not the one it possessed for them at the time of Independence." Gordon S. Wood, *The Creation of the American Republic 1776-1787* 152 (1969); *accord* Vile, *supra*, at 134; Corwin, *supra*, at 514. The early understanding focused on the concerns that motivated the Revolution, primarily, if not exclusively, curtailing despotic executive authority. Wood, *supra*, at 157. Following the Revolution, foremost on the minds of those revolutionaries was adherence to the democratic ideal, as embodied in the legislative branch. *Id.* at 157-58. Accordingly, the separation of powers the revolutionaries had in mind was, at most, a division of the executive and legislative branches. *Id.* at 159; Vile, *supra*, at 137-38 (judiciary not elevated to same level nor given same independence as legislative and executive branches).

Despite the bipolar *theory* of separation of powers prevalent in the post-Revolution years, separation of powers in *practice* most often meant legislative hegemony. Vile, *supra*, at 134, 143; Corwin, *supra*, at 514. "In every state the most earnest efforts to keep the several departments of government within their constitutional limits were defeated by the encroachments of the legislature

upon the executive and the judiciary." Carpenter, *supra*, at 32-33. In reality, governmental control came almost completely to vest in the legislature. *Id.* at 34; Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 Va. L. Rev. 1253, 1262 (1988).

In the years following the Revolution, popular control soon resulted in disturbing abuses. Contemporary reports were full of the excesses of the state legislatures. *See generally*, Vile, *supra*, at 143-44; Corwin, *supra*, at 514-21. Edmond Randolph, for example, chastised the Virginia legislature for conduct of "a most striking and shocking nature": Condemning a man by bill of attainder "[w]ithout being confronted with his accusers and witnesses, without the privilege of calling for evidence in his behalf, he was sentenced to death, and was afterwards actually executed." Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. Chi. L. Rev. 385, 394 n.19 (1935). Randolph argued that "every thing has been drawn within the legislative vortex," *id.*, words Madison echoed in *The Federalist No. 48*: "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." *Id.* at 333 (James Madison) (Jacob E. Cooke ed., 1961).

Particularly prominent and well-documented in this pre-constitutional period was the constant usurpation of the judicial function by the state legislatures. Vile, *supra*, at 143; Wood, *supra*, at 154-56; Corwin, *supra*, at 514; Sharp, *supra*, at 393. In part, this state of affairs was born of necessity. There were too few trained judges and lawyers, and so the legislative assemblies were required to take up many judicial tasks. Wood, *supra*, at 154; Corwin,

supra, at 515. But there was a theoretical basis for this combination of functions as well. To the revolutionaries, from whose perspective there were only *two* powers that required separating, it was common to see the judicial power as a part of the executive. *See* Wood, *supra*, at 159 ("the judicial power is only a branch of the executive, the CHIEF of every country being the first magistrate") (quoting contemporary author). As the Revolution progressed, however, and as the legislative branch gained ascendancy, it became accepted that the law ought to operate in the hands of the people. Carpenter, *supra*, at 34. "The Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it." Wood, *supra*, at 161. Thus, usurpation of judicial functions by the legislative branch progressed naturally from the transfer of power from the executive to popular assemblies.

The legislature's dominance of the judiciary was evident throughout the newly independent country. For example, after the Rhode Island Superior Court suggested a law might be unconstitutional, the legislature held a special joint session and required the judges to attend and defend the court's decision. The judges escaped impeachment but were not reappointed when their terms expired. *See* 1 Charles G. Haines, *The American Doctrine of Judicial Supremacy* 105-12 (1932) (discussing 1786 case of *Trevett v. Weeden*). Similarly, the North Carolina legislature brought charges against judges who rendered an adverse decision and demanded the judges appear to defend themselves. *Id.* at 112-20 (discussing 1787 case of *Bayard v. Singleton*). Madison documented

similar abuses. Quoting Jefferson in regard to the Virginia legislature, Madison wrote: "They have accordingly *in many* instances *decided rights* which should have been left to *judiciary controversy*." *The Federalist No. 48*, at 336 (James Madison) (Jacob E. Cooke ed., 1961). Madison observed similar conduct by the Pennsylvania legislature: "The salaries of the Judges, which the [state] Constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department, frequently drawn within legislative cognizance and determination." *Id.* at 337.

Legislative interference with the judicial function often took the form of upsetting final judgments or simply ordering the readjudication of a settled controversy. The New Hampshire legislature, for example, "freely vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes." Corwin, *supra*, at 514. New Hampshire's experience was not unique nor "more aggravated" than other states, Corwin reports, noting that such practices "were widespread." *Id.* at 515.[2]

---

[2] The Provincial Legislature of Massachusetts also usurped judicial powers, including ordering the readjudication of settled controversies. For example, the legislature suspended the levying of an execution upon a judgment from a court; it voided a court's order to seize an individual's homestead as part of a judgment; and it ordered a court to hear an appeal and suspended the judgment of the lower court. *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208, 210-12, 217 (1901-02).

A case in point was Pennsylvania, where the legislature remitted fines, disallowed judicially established claims, and set aside jury verdicts. *Id.* at 520.

The ultimate result of this disturbing accretion of all governmental power to legislative bodies was, of course, nothing less than our modern conception of separation of powers, including the idea of checks and balances. The challenge of the Philadelphia Convention was to design a system in which legislative power could be contained. Vile, *supra*, at 152-58. The idea of checks and balances was seen as a way to limit illegitimate legislative activity:

> By the time that the Convention met, important sections of opinion among its members had already accepted the two central positions of modern American constitutional thought. The separation of powers was by this time, in the words of a contemporary pamphleteer, 'a hackneyed principle', or a 'trite maxim'. Now, however, *the idea of checks and balances*, rejected at the height of revolutionary fervour, *was considered an essential constitutional weapon to keep all branches of government, and especially the legislature, within bounds.*

Id. at 153 (emphasis added) (footnote omitted).

From this determination to check legislative abuses came the creation of an independent judiciary. Vile, *supra*, at 158; Wood, *supra*, at 453-54 ("The department of government which benefited most from this new, enlarged definition of separation of powers was the judiciary."). The Convention established the judiciary as a co-equal, third-branch of government. U.S. Const., art. III. In order to guarantee independence, the judges were given life

tenure, and protection against diminution of salary. *Id.* § 1.[3] In *The Federalist No. 78*, Hamilton echoed Montesquieu as to the need for an independent judiciary to guarantee liberty: "[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . . " *Id.* at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

The Convention's efforts to ensure an independent judiciary produced two important ideals of constitutional liberty, one perhaps more well-known than the other, but the latter equally important. First, of course, is the practice of judicial review. Although the Constitution is silent on this point, many of the framers intended judicial review of the constitutionality of legislative enactments. Vile, *supra*, at 158; Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. Rev. 747, 749 (1992); Benjamin F. Wright, Jr., *The Origins of the Separation of Powers In America*, Economica 169, 183 (May 1933). The Federalist Papers anticipated and justified the practice. *The Federalist No. 78*, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). And *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), justly renowned, set it in stone.

But judicial review is meaningful only if the judiciary is independent, and there is not judicial independence if final judicial decisions can be overturned at will by the

---

[3] The Convention explicitly rejected a Council of Revision that would have intermingled judges and other officials in reviewing the constitutionality of legislative enactments. Max Farrand, *The Framing of the Constitution of the United States* 156-57 (9th ed. 1913); Carpenter, *supra*, at 42.

legislative or executive branches. As Corwin explained: "[T]o produce judicial review, the notion of the Constitution as law must be accompanied by the principle of the finality of judicial constructions of the law . . . ." Corwin, *supra*, at 524. Thus, he condemned the pre-constitutional legislatures, accusing them of "the withholding from judicial power of that which, to the modern way of thinking, is its highest attribute – to wit, *power of deciding with finality*." *Id.* at 516 (emphasis added). Hamilton, seeking to justify the check of an independent judiciary, drew the line that governs even today: "*A legislature without exceeding its province cannot reverse a determination once made, in a particular case*; though it may prescribe a new rule for future cases." *The Federalist No. 81*, at 545 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added). In order for the judiciary to function independently, its final judgments in specific cases must be respected, without regard to whether popular assemblies approve of the result.

B. *Hayburn's Case* Preserves An Independent Judiciary By Ensuring That Neither Congress Nor The Executive Branch Overturns Or Otherwise Revises The Final Decisions Of An Article III Court.

In *Hayburn's Case* the twin pillars of the judicial check – the power of judicial review and the principle of

judicial finality – found voice.[4] *Hayburn's Case* involved the Invalid Pensions Act, passed to provide pensions to Revolutionary War veterans. Lacking an administrative bureaucracy, Congress pressed into service the circuit judges, who would hear the claims of veterans and rule upon their validity. Judicial decisions were not final, however: Circuit Court determinations could be overturned by the Secretary of War for "fraud or imposition," and the last word on payment rested with Congress. Although this Court never issued an opinion on the merits in *Hayburn's Case*,[5] appended to the report of the case are the opinions of the Supreme Court Justices, riding circuit, speaking to the validity of the enactment.[6]

---

[4] *See generally* Susan L. Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 590-613; Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527.

[5] *See Hayburn's Case*, 2 U.S. (2 Dall.) at 409-10. After Congress amended the statute to provide for alternative relief for the pensioners, the Court dismissed the case on grounds of mootness. The unconstitutional statute was repealed by Congress and replaced by one that did not require participation by the Circuit Judges. Bloch, *supra*, at 590 n.94; Marcus & Teir, *supra*, at 528 n.4.

[6] The written opinions reflect the views of five of the six Justices then sitting on this Court. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 409-10. Professor Bloch reports that Justice Johnson also expressed his views elsewhere as to the unconstitutionality of the Invalid Pensions Act. *See* Bloch, *supra*, at 591-92 (noting that Justice Johnson, along with Judge Bee, refused to process six applications under the Act because he believed the court could not "constitutionally take Cognizance of and determine on the said Petitions").

The judicial role required by the Invalid Pensions Act was unanimously rejected by the judges in *Hayburn's Case* because the statute violated the principle of judicial finality. 2 U.S. (2 Dall.) at 409. That principle is straightforward: The final decisions of Article III courts cannot be subject to revision by any other branch. *Id.* Thus, reasoned the judges in *Hayburn's Case*, because they were being asked to render a decision subject to revision, the request violated the Constitution by assigning to them a task not "of a judicial nature." *Id.* at 410 n.2 (opinion of the Circuit Court of Pennsylvania (Justices Wilson and Blair, and Judge Peters)).

Although the Justices wrote separately and from locations distant, their reasoning bore great similarity. The Circuit Court of New York (Chief Justice Jay, Justice Cushing, and Judge Duane) stated that the tasks assigned under the Act were not "properly judicial" because the Act "subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the Legislature." *Id.* Similarly, the Circuit Court of Pennsylvania (Justices Wilson and Blair, and Judge Peters) complained that the court's judgments "might . . . have been revised and controled by the legislature, and by an officer in the executive department." *Id.* "Such revision and control," the Court stated, "we deemed radically inconsistent with the independence of that judicial power which is vested in the courts . . . . " *Id.* Finally, the Circuit Court of North Carolina (Justice Iredell and Judge Sitgreaves) stated "inasmuch as the decision of the court is not made final, but may be at least suspended in its operation by the secretary at war . . . this subjects the

decision of the court to a mode of revision which we consider to be unwarranted by the constitution." *Id.* Summing up, the North Carolina Circuit Court stated, in words that govern here:

> [N]o decision of any court of the United States can, under any circumstances . . . agreeable to the constitution, be liable to a reversion, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

Id.

The importance of the rule in *Hayburn's Case* should be self-evident. The judiciary was conceived by the people as an important check on legislative power, and thus a guarantee of the rights of private citizens. *See* Corwin, *supra*, at 517 (explaining that the "structural and functional shortcomings of the early state constitutions played directly into the hands of both popular and doctrinal tendencies which distinctly menaced what Madison called 'the security of private rights' "). That check is worthless, however, if it may be overturned at will by the legislative branch, effecting popular will as against private rights. In order to serve as a check, the final judgments of the judicial branch must be respected. It is telling that the first act of judicial review by Justices of this Court was taken in the name of judicial finality. *See* Marcus & Teir, *supra*, at 530 (remarking that the New York Circuit Court's views "represented the first instance of federal judges discussing the constitutionality of a piece of federal legislation").

Perhaps the most powerful paean to the absolute nature of the principle of judicial finality is found in Chief Justice Taney's opinion for the Court in *Gordon v. United States*, 117 U.S. 697 (1865), published after his death.[7] *Gordon* involved the establishment of the Court of Claims. The statute there at issue provided for payment of the judgments of the Court of Claims, or of the Supreme Court if an appeal was taken, but no payment could be made until "the claim allowed has been estimated for by the Secretary of the Treasury, and Congress, upon such estimate, shall make an appropriation for its payment." *Id.* at 698. While this Court upheld the statute with regard to the Court of Claims, it determined that as applied to the Supreme Court, the statute violated the principle of judicial finality. *Id.* at 704.

Writing to overturn the statute at issue in *Gordon*, Chief Justice Taney stated that the judgment of an Article III court must be "*final and conclusive* upon the rights of the parties." *Id.* at 702 (emphasis added). "[N]o principle of constitutional law has been more firmly established or constantly adhered to . . . . " *Id.* at 704.[8] That rule, that judicial decisions must be "final and conclusive, and may

---

[7] The judgment in *Gordon v. United States* was published at 69 U.S. (2 Wall.) 561 (1865). That judgment indicates an opinion would be forthcoming. Some twenty years later the Court assented to printing the opinion Chief Justice Taney had prepared, which the Clerk had located at the suggestion of members of the Court. 117 U.S. at 697.

[8] While legislative encroachments upon the judiciary are rare, the principle of finality is relied upon every day. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (discussing *res judicata*).

not be subject to revision by another branch of government," has been adhered to consistently by this Court. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962); *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647-48 (1875); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 49-52 (1852).[9]

C. The Rule In *Hayburn's Case* Governs This Case.

Resolution of this case turns on a straightforward application of the rule that neither the legislative nor the executive branch may overturn a final decision of an Article III court. This rule represents, again to quote Corwin, the "highest attribute" of an independent Article

---

[9] *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), is not to the contrary. In that case, Congress provided for adjudication of certain claims of the Sioux against the United States, although the claims had been litigated previously and final judgments had been entered. Rather than finding the statute that authorized relitigation a violation of *Hayburn's Case*, this Court correctly observed that all Congress had done was waive the United States' defense of *res judicata*. *Id.* at 407 (finding that "Congress had not 'reversed' the Court of Claims' holding that the claim was barred by res judicata . . . . [I]t only was providing a forum so that a new judicial review of the Black Hills claim could take place"). Moreover, it is noteworthy that *Sioux Nation* involved litigation in which the United States was a party. No case involving purely private parties authorizes Congress to overturn or otherwise review a judicial decision.

Nor are *Freeland v. Williams*, 131 U.S. 405 (1889), or *Fleming v. Rhodes*, 331 U.S. 100 (1947), to the contrary. Neither *Fleming* nor *Freeland* involve revision or modification of the judgment of an Article III court by Congress, and therefore, neither case has any relevance whatsoever to the separation of powers issue presented by Section 27A(b).

III court. Corwin, *supra*, at 516. Yet, Section 27A(b), to the extent it applies at all to this case, squarely violates the rule.

In this case, as in *Plaut* and *CIGNA*, the courts had determined that the complaints were untimely filed, pursuant to this Court's decision in *Lampf*. Final judgment was entered in each case, and in each case the time for taking an appeal expired with no appeal taken. Those decisions were the final decisions of Article III courts. *See Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965) (defining "final judgment"); *cf. Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993) (retroactive application of new law only applies to those cases, civil and criminal, "still open on direct review"). Despite those final decisions, with Section 27A(b) Congress nonetheless ordered the Article III courts to adjudicate the cases again.

D. Arguments Advanced To Defend Section 27A(b) In Light Of *Hayburn's Case* Are Unavailing.

It seems difficult to avoid the conclusion that, to the extent it applies to overturn final judgments, Section 27A(b) runs afoul of the rule of judicial finality. Nonetheless, in the various proceedings in this and other Section 27A(b) cases, arguments have been advanced as to why what appears obvious is not so. These arguments largely reflect a failure to confront squarely the principles of judicial finality, and most of the arguments are flatly belied by the historical record. *Amici* submit that none of these arguments avoid the conclusion that as applied to final decisions from which timely appeal could not be taken, Section 27A(b) is unconstitutional.

1. It Is Irrelevant That Section 27A(b) Ordered Readjudication Rather Than Prescribing A Result.

It is irrelevant that Congress simply required readjudication of the claims that had been finally decided, rather than prescribing a result. The rule in *Hayburn's Case* is not a prohibition on telling a court *how* to decide a case. It is a prohibition on failing to give "binding and conclusive" effect to the final judgment of an Article III court. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948); *Gordon v. United States*, 117 U.S. at 702 ("final and conclusive") (Taney, C.J.). The prohibition on prescribing certain rules of decision comes instead from *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). But *Hayburn's Case* provides an entirely separate rule from *Klein*. *See Plaut*, 1 F.3d 1487, 1497 n.14 ("we believe § 27A(b) forces the courts to rule again on cases they have dismissed with prejudice, not that it forces the courts to rule on those cases (or any cases) in a particular way").

The historical record makes clear that the crux of the rule in *Hayburn's Case* is finality, without regard to whether the legislature actually resolves the dispute among the parties. Time and again on the list of grievances about legislative usurpation of judicial independence were complaints about legislatures reopening final judgments. These complaints were separate from, and in addition to, concerns about overturning on the merits.[10] Both forms of revision were equally untenable.

---

[10] *See, e.g.*, Corwin, *supra*, at 514-15 (New Hampshire legislature "vacated judicial proceedings, suspended judicial

2. It Is Irrelevant That Congress Is Free To Prescribe A Rule Governing Future Cases.

Similarly, it also is irrelevant that Congress remains free at any time to prescribe a rule applicable in future cases. There is no doubt that Congress is free to prescribe rules to govern future events. *The Federalist No. 81*, at 545 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) (Congress may not reverse judicial determination "though it may prescribe a new rule for future cases"). In fact, when Congress so acts, the decision is applicable to any case *pending on appeal* at the time of the enactment. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

The critical point in this case is that no matter how one characterizes what Congress did, the case was *not* pending on appeal at the time Congress acted. The case was final. That the judgment may rest on a statute of limitations is immaterial: To the extent the judgment spoken of is a final judgment, it is immune from legislative revision, even though the statute of limitations surely is not. To hold otherwise is to reduce *Hayburn's Case* to a nullity.[11]

---

actions, annulled or modified judgments"); *id.* at 520 (Pennsylvania legislature remitted fines and disallowed judicially established claims); *Judicial Action by the Provincial Legislature of Massachusetts*, *supra*, at 210 (legislature overturned execution order); *id.* at 217 (legislature suspended judgment).

[11] It likewise certainly must be irrelevant (although it has been argued) that the statute Congress enacted is seen – at least by the plaintiffs in these cases – as undoing the mischief of this Court's decision in *Lampf*. The revolutionary legislatures no doubt often felt – as Congress apparently felt when it sought to undo the work of this Court – that the judicial branch had gone

3. It Is Irrelevant That Congress' Interference With Final Judgments Took The Form Of Ordinary Legislation.

The United States repeatedly has argued that Congress in enacting Section 27A did not sit as a "court of errors" but performed a "quintessentially legislative" act of prescribing the statute of limitations. But it plainly is of no significance, as argued above, that the reversal of Article III decisions took the form of a statute *of limitations*. The reality of the matter is that the legislative decision overturned a final judicial decision. The United States may be advancing an argument that Section 27A(b) was quintessentially legislative because it took the form

---

astray. That sense of "Right and Justice" is precisely what motivated the revolutionary legislatures:

> They continually tried cases in equity, occasionally extended temporary equity power to some common law court for a select purpose, and often granted appeals, new trials, and other kinds of relief in an effort to do what "is agreeable to Right and Justice." As a committee of the Maryland Assembly declared in 1719, "a legislative body is not tied to common rules, for if the thing be just they make new rules or dispense with old ones as to the manner of doing it."

Wood, *supra*, at 155. But as the Constitution's framers came ultimately to understand, there must be a limitation upon the *ad hoc* undoing of judicial decisions by the legislative branch. That limitation is expressed in *Hayburn's Case*.

Similarly, it is well understood that a judgment is final and conclusive whether or not it is based on a correct understanding of the law: "Nor are the res judicata consequences of a final judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

of a statute. But the framers foresaw and rejected this argument over two hundred years ago. In *The Federalist No. 48* Madison wrote:

> If therefore the Legislature assumes executive and judiciary powers, no opposition is likely to be made; *nor if made can it be effectual; because in that case, they may put their proceeding into the form of an act of Assembly, which will render them obligatory on the other branches.* They have accordingly in many instances decided rights which should have been left to judiciary controversy . . . .

Id. at 336 (James Madison) (Jacob E. Cooke ed., 1961).

The difficulty with this argument, if indeed the United States is making it, is that it excuses legislative action simply because it is in the form of a statute, without regard to what the statute does. But labeling an act "quintessentially legislative" does not avoid its unconstitutional impact. "The concept of legislative power here expressed is obviously a purely formal one: 'legislative power' is any power which the legislative organ may choose to exercise by resort to the ordinary parliamentary processes." Corwin, *supra*, at 516. Indeed, because the only way Congress can act is through the legislative process, *see I.N.S. v. Chadha*, 462 U.S. 919 (1983), the proper focus is upon the impact of the legislative act. What Congress has done is to reverse final judgments, and that is impermissible.

4. The Rule In *Hayburn's Case* Unquestionably Is That Decisions Of Article III Courts Must Be "Binding And Conclusive Upon The Parties," And That Such Judgments Are Not Subject To Revision By The Legislative Or Executive Branches.

Finally, there seems to be some argument that *Hayburn's Case* does not even stand for the proposition for which *amici* cite it. Thus, the United States has made the following odd argument:

> Defendants assert that the panel here correctly relied upon *Hayburn's Case* because the Supreme Court there established that neither Congress nor the Executive can disturb a final judgment of an Article III court. This statement is manifestly wrong, and can easily be checked by reading the statements by the Justices in that case.
>
> . . . .
>
> There is absolutely *no* indication of even the slightest kind that the Justices in *Hayburn's Case* held that Congress cannot enact *new* legislation that has the effect of overriding a prior judgment of a court. Since that is not what happened in *Hayburn's Case*, there would have been no reason for the Justices even to address that question, and they did not.

United States' "Reply to Response to Petition by the United States for Rehearing with an In Banc Suggestion" at 4a-5a, in *Plaut*, 1 F.3d 1487 (see Appendix).

From the time of *Hayburn's Case* to the present, that decision has stood for the proposition that the final decisions of Article III courts are not subject to revision by the

legislative or executive branches. In *Gordon*, Chief Justice Taney stated, with regard to the rule in *Hayburn's Case*, "no principle of constitutional law has been more firmly established or constantly adhered to." 117 U.S. at 704. The decision has been cited numerous times, by this Court[12] and by the lower courts,[13] for just this proposition. Numerous commentators are in accord.[14]

It is true that in *Hayburn's Case* Congress did not enact a law overturning a judicial decision. That is because the courts that spoke in that case did not give Congress a chance to do so. Rather than subject their rulings to congressional overturning, the courts declined to perform the statutory duties, the first instance in which a court invalidated an Act of Congress. But the courts were clear as to their reason for doing so: It was because Article III final judgments are not subject to revision. That rule is clear, and *amici* submit that as to the small number of Section 27A(b) cases that had gone to final

---

[12] *See, e.g., United States v. Sioux Nation of Indians*, 448 U.S. 371, 391-92 (1980); *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400 & n.29 (1934); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 49-52 (1852).

[13] *See, e.g., Town of Deerfield v. F.C.C.*, 992 F.2d 420, 427-28 (2d Cir. 1993); *In re President's Commission on Organized Crime*, 783 F.2d 370, 375 (3d Cir. 1986); *In re Sharon Steel Corp.*, 100 B.R. 767, 774 (Bankr. W.D. Pa. 1989).

[14] *See, e.g.*, 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 2.13(e) (2d ed. 1992); Bernard Schwartz, *A History of the Supreme Court* 25-26 (1993); Charles A. Wright, *The Law of Federal Courts* § 12 & n.28 (4th ed. 1983); Bloch, *supra*, at 592; Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 646-47 (1992); Marcus & Teir, *supra*, at 530.

judgment, its application is equally clear: Section 27A(b) cannot operate to disturb final, non-appealable judgments.

II. THIS COURT DOES NOT NEED TO ADDRESS THE CONSTITUTIONAL QUESTION BECAUSE CONGRESS DID NOT INTEND SECTION 27A(b) TO REACH FINAL DECISIONS.

The Supreme Court will not address a constitutional question "if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). When faced with the argument that a statute is unconstitutional, the Court therefore must "first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988); *accord Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2283 (1993); *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). If a constitutionally valid interpretation is possible, it is the Court's "plain duty" to adopt such an interpretation. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

Section 27A(b) can and should be interpreted in a constitutionally valid manner. By its terms, Section 27A(b) directs the reinstatement of a "private civil action" that had been dismissed as time barred after the *Lampf* decision, but it does not evince an intent by Congress to undo a "final judgment," i.e. a case "where the judgment . . . was rendered, the availability of appeal exhausted, and the time for petition for certiorari had

elapsed." *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965); *accord Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805 (11th Cir. 1988) (interpreting Congress' retroactive application of law to "actions" brought prior to a certain date as being inapplicable to final judgments), *cert. denied*, 490 U.S. 1090 (1989). Judge Keith adopted this distinction in *Plaut*. In his separate opinion, Judge Keith refused to strike down Section 27A(b) in its entirety, reasoning that it should be interpreted to apply only to those cases still on appeal:

> In the case at hand, Congress was unable to protect these litigants under section 27A(b), because by the time 27A(b) was enacted, the time period for filing an appeal had passed. Nevertheless, for those litigants who did appeal the district court's initial dismissal of their claim, section 27A(b) does not disturb final judgments, and is therefore consistent with separation of powers requirements.

1 F.3d at 1500 (Keith, J., concurring in part and dissenting in part).

Other circuit courts that have upheld the constitutionality of Section 27A when applied to pending cases have also recognized the constitutional implications of reinstating a "final judgment."[15] Two district courts have

---

[15] *See Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 83 (2d Cir. 1993) ("Because the claims at issue had not passed into final judgment within the constitutional definition of that term at the time that Judge Lasker reinstated Johnson's complaint, Andersen's challenge to the application of § 27A(b) fails."); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269, 273 n.11 (1st Cir. 1993) ("It is well established that a party's property right in a cause of action does not vest 'until a final, unreviewable judgment has been obtained.' At the time that Section 27A was signed into law, no final judgment had been entered in the instant case.") (citations omitted); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 277 (7th Cir. 1993) ("[I]n the instant case there is no final judgment to be upset. At the time that section 27A was passed, this case was pending on appeal."); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993) ("none of these cases involve 'final judgments' in the constitutional, separation of powers sense of the term").

avoided the constitutional problems raised by Section 27A(b) by interpreting the statute to not apply to final and unappealed judgments.[16] *See also Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 823 (D.C. Cir. 1974) (court unwilling to interpret act as disturbing final judgments without clear evidence that act was so intended).

The legislative history of Section 27A demonstrates Congress' intent to apply Section 27A(b) only to those suits that were dismissed but which had not yet become final. In discussing the bill that was to become Section 27A, its co-sponsor stated that the bill would not upset the final judgment regarding the parties whose rights

---

[16] *Barr v. McGraw-Hill*, 1992 WL 196754, at *7 n.17 (S.D.N.Y. Aug. 3, 1992) ("the Court finds that because section 27A(b) stops at allowing the reinstatement of section 10(b) actions, and does not speak of judgments, no constitutional problem is presented"); *Rabin v. Fivzar Assocs.*, 801 F. Supp. 1045, 1055 (S.D.N.Y. 1992) ("Although § 27A(b) directs courts to reinstate cases dismissed as time barred subsequent to June 19, 1991 if they would have been timely under the law existing on that date, it does not speak specifically to cases in which final judgment has been entered and the time for appeal has expired.").

were adjudicated in *Lampf*. On November 21, 1991, Senator Garn addressed Senator Riegle, co-sponsor of the "Securities Investor Protection Act." Senator Garn stated that it was his understanding that the bill "is not intended to apply to or in any way affect the parties or the claims in the *Lampf* decision itself. The Supreme Court's final judgment in the *Lampf* case will remain intact for the parties in that case." 137 Cong. Rec. S17,382-01 (1991). Senator Garn then asked Senator Riegle if this was the correct interpretation of the bill. *Id.* Senator Riegle replied, "Yes, that is correct." *Id.* Yet if Section 27A(b) were read to apply to the final judgment in this case, it would necessarily apply to the litigants who were before this Court in *Lampf*.

Consistent with the legislative history, Section 27A(b) can and should be interpreted so as not to overturn final judgments. If Section 27A(b) overturns final judgments, then it violates separation of powers and the rule in *Hayburn's Case*. This Court need not resolve the question, however. It is the usual practice of this Court to assume that Congress enacted legislation that does not present such a "serious constitutional question." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *accord Daylo*, 501 F.2d at 818-19, 823. *Amici* respectfully submit that would be the appropriate course in this case.

CONCLUSION

Accordingly, *amici* respectfully request this Court either rule that Section 27A(b) does not reach cases that had gone to final judgment at the time of its enactment, or rule – alternatively – that if those cases are within the ambit of Section 27A(b), the section violates the rule in *Hayburn's Case*.

Respectfully submitted,

ELIZABETH S. FEAMSTER
FOWLER, MEASLE & BELL
300 W. Vine Street
Kincaid Towers
Suite 650
Lexington, Kentucky 40507
(606) 252-6731

JAMES E. BURNS, JR.
KEVIN P. MUCK
JOHN MISSING
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, California 94105
(415) 442-0900

Counsel for Amicus Curiae Kemper Securities, Inc. (formerly Bateman Eichler, Hill Richards, Inc.)

BARBARA B. EDELMAN
BARRY FRIEDMAN*
G. CHRISTOPHER VAN BEVER
STEVEN L. SNYDER
WYATT, TARRANT & COMBS
The Lexington Financial Center
250 West Main Street
Lexington, Kentucky 40507
(606) 233-2012

Counsel for Amicus Curiae Spendthrift Farm, Inc.

**Counsel of Record*

APPENDIX

United States' "Reply to Response to Petition by the United States for Rehearing with an In Banc Suggestion" in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir.), *reh'g denied*, 11 F.3d 572 (1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11, 1994) 1a

No. 92-5591

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ED PLAUT, *et al.*,
Plaintiffs-Appellants,
v.
SPENDTHRIFT FARM, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

REPLY TO RESPONSE TO PETITION BY THE UNITED STATES FOR REHEARING WITH AN IN BANC SUGGESTION

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

LESLIE E. SMITH
Senior Litigation Counsel
Securities and Exchange Commission
Washington, D.C. 20549

FRANK W. HUNGER
Assistant Attorney General

KAREN K. CALDWELL
United States Attorney

DOUGLAS LETTER
BARBARA C. BIDDLE
SCOTT R. McINTOSH
(202) 514-3602
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

The United States and the plaintiffs/appellants in this case petitioned for rehearing *in banc*, and the Court directed the defendants/appellees to file a response. Defendants' response warrants this short reply making two points.

First, defendants do not rebut our contention that this case involves a question of exceptional importance. Second, defendants' reliance upon the various statements by the Justices in the moot controversy in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) is manifestly wrong because it misrepresents what was at stake there, and thus the meaning of those statements.

1. As we pointed out in our rehearing petition, several factors combine to make this one of those rare instances in which rehearing *in banc* consideration is warranted.

A panel of this Court has, over a partial dissent, struck down as unconstitutional on separation of powers grounds a duly enacted Act of Congress. This ruling is in direct conflict with a contemporaneous decision by the Fifth Circuit. And, the reasoning employed by the panel of this Court has been rejected by the Ninth and Tenth Circuits in upholding a related subsection of the statutory provision at issue.

Defendants quibble in unimportant ways with our reliance on these factors. They say that the Fifth Circuit in its *Pacific Mutual Life Insurance Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993) opinion did not address *Hayburn's Case*. However, *Hayburn's Case* was specifically discussed in the briefs filed in the Fifth Circuit. In any event, the issues in this case and in *Pacific Mutual* are

identical, and the panel's ruling here accordingly creates a direct conflict among the circuits.

Defendants point out that the six circuits other than the Fifth Circuit that have to date upheld Section 27A have done so in the context of cases arising under subsection (a) of that section, while this case involves subsection (b). We are well aware of the difference between these two sections. However, what we explained in our rehearing petition (at 2) is that the constitutional analysis employed by the panel of this Court here is inconsistent with that used by the Ninth Circuit in *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993), and the Tenth Circuit in *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993). Indeed, one of the district court rulings reversed in *Gray* by the Ninth Circuit cited *Hayburn's Case* (see *In re Brichard Securities Litigation*, 788 F. Supp. 1098, 1107 (N.D. Cal. 1992)), and that case was discussed at length by the parties in their briefs before the Ninth Circuit. This Court need only glance at the opinions from the Fifth, Ninth, and Tenth Circuits to see the inconsistency in approach between them and the panel here.

Thus, the decision by the panel here is quite isolated among the courts of appeals.

A question of exceptional importance is *always* involved when a court of appeals invalidates an Act of Congress, a rare occurrence. It is even rarer when an appellate court does so on separation of powers principles, which go to the heart of our system of government.

Moreover, the Act of Congress struck down here is *not* some obscure provision secretly inserted by a single

legislator without any discussion into a gargantuan bill. To the contrary, Section 27A was debated in Congress and was the product of complete legislative consideration.

In sum, defendants have merely argued that the panel here was right. They have not in any way undermined our contention that consideration by this full Court is warranted if the Court is going to strike down a thoroughly considered Act of Congress on separation of powers grounds, in direct conflict with a recent ruling by another circuit, and using reasoning that was rejected by other circuits also in recent opinions. Such a serious act and creation of a clear conflict in the circuits calls for *in banc* review by this Court. We note that four other circuits make clear in their rules or operating procedures that creation of a circuit split like this is a ground for rehearing *in banc*. See D.C. Circuit Rule 14; Seventh Circuit Rule 40(c); Ninth Circuit Rule 35-1; Fourth Circuit IOP 40.5.

2. Defendants assert (Response at 2, 3) that the panel here correctly relied upon *Hayburn's Case* because the Supreme Court there established that neither Congress nor the Executive can disturb a final judgment of an Article III court. This statement is manifestly wrong, and can easily be checked by reading the statements by the Justices in that case.

The statute at issue in *Hayburn's Case* authorized the Secretary of War to revise judgments of an Article III court regarding pension awards to Revolutionary War veterans. See Act of March 23, 1792, ch. 11, 1 Stat. 243. Under the statute, federal circuit courts were directed to examine pension applicants and "transmit [to the Secretary of War] the result of their inquiry, in case * * * the

applicant should be put on the pension list." *Id.* at 244. The Secretary of War was then authorized to "withhold the name of such applicant from the pension list, and make report * * * to Congress" in any case in which he had "cause to suspect imposition or mistake." *Ibid.*

The Justices made clear in their various statements in *Hayburn's Case* that neither the Executive Branch nor Congress can "sit as a court of errors" (2 U.S. at 410) reviewing decisions by Article III courts.

There is absolutely *no* indication of even the slightest kind that the Justices in *Hayburn's Case* held that Congress cannot enact ***new*** legislation that has the effect of overriding a prior judgment of a court. Since that is not what happened in *Hayburn's Case*, there would have been no reason for the Justices even to address that question, and they did not.

As we pointed out in our rehearing petition, seven circuits have concluded that, in enacting Section 27A, Congress did provide new legislation having the effect of overriding prior rulings. It is not clear to us if the panel here indeed meant to disagree with these circuits on this point, but it might have. See slip op. at 22 n.15 ("In enacting §27A, Congress did not 'change the underlying law' * * * ").

If the panel indeed held that Congress did not pass any new legislation in enacting Section 27A, rehearing *in banc* is even more appropriate because of the overwhelming court of appeals authority holding otherwise. See slip op. at 11 n.11 (listing rulings by seven circuits upholding Section 27A). If the panel did not, we are quite puzzled as to why defendants believe that *Hayburn's Case* provides

the answer here, and why the panel so ruled. It is precisely because the panel accepted this misconceived argument that a new look by the full Court is needed. Indeed, the failure of the Fifth Circuit in *Pacific Mutual* to discuss *Hayburn's Case* in its opinion, even though that case was raised in the briefs, is quite understandable given the significant difference between the statutory scheme involving Revolutionary War veterans and Section 27A.

3. Finally, we note with interest that defendants do not even attempt to address our reliance in our petition on Supreme Court precedents such as *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947), and *Freeland v. Williams*, 131 U.S. 405, 417-21 (1889). Those decisions show that the Supreme Court has upheld statutes that legislatively annul court judgments affecting private rights. Unless defendants can deal with these cases, they have a very difficult time stating a convincing argument that there is some constitutional prohibition against legislation like Section 27A.

Rehearing is needed so that we can in briefing – rather than in the restrictive medium of a rehearing petition – address the various Supreme Court precedents involving legislative overrides of court judgments, and so that the Court can inquire whether defendants have any ways to get around those precedents.

For these reasons, and those stated in our rehearing petition, rehearing *in banc* should be granted.

Respectfully submitted,

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

LESLIE E. SMITH
Senior Litigation Counsel
Securities and Exchange Commission
Washington, D.C. 20549

FRANK W. HUNGER
Assistant Attorney General

KAREN K. CALDWELL
United States Attorney

/s/ Douglas Letter
DOUGLAS LETTER
BARBARA C. BIDDLE
SCOTT R. McINTOSH
(202) 514-3602
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

September 27, 1993

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 1993, I have served the foregoing REPLY TO RESPONSE TO PETITION BY THE UNITED STATES FOR REHEARING WITH AN IN BANC SUGGESTION by mailing true copies, first-class postage prepaid, to:

J. Montjoy Trimble
Trimble-Bowling
163 West Short Street
Lexington, Kentucky 40507

Richard C. Ward, Esq.
Wyatt, Tarrant & Combs
The Lexington Financial Center
250 West Main Street
Lexington, Kentucky 40507

James E. Burns, Jr., Esq.
Brobeck, Phleger & Harrison
Spear Street Tower
One Market Plaza
San Francisco, CA 94105

Guy R. Colson, Esq.
Fowler, Measle & Bell
400 Bank One Plaza
Lexington, Kentucky 40507

Harry B. Miller, Esq.
Miller, Griffin & Marks
271 West Short Street
Suite 700
Lexington, Kentucky 40507-1292

William E. Johnson, Esq.
Stoll, Keenon & Park
1000 First Security Plaza
Lexington, Kentucky 40507-1380

L. Clifford Craig, Esq.
Taft, Stettinius & Hollister
1800 Star Bank Center
Cincinnati, Ohio 45202

David Edwards, Esq.
Pillsbury, Madison & Sutro
P.O. Box 7880
San Francisco, CA 94120

/s/ Douglas Letter
Douglas Letter